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Impeachment: The Constitutional Problems

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IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS. By Raoul Berger.[1] Cambridge, Mass.: Harvard University Press. 1973. Pp. xii, 345. $14.95.

Reviewed by Nathaniel L. Nathanson[2]

Rarely has a serious study in constitutional law and history achieved the popular success that has apparently been accorded Raoul Berger's latest contribution to legal literature. It has not yet appeared in the New York Times best-seller list, but the demand for it in law libraries and the extent to which it has been quoted in the press must have reached phenomenal proportions. Lest there be the slightest suspicion that this phenomenon has been anything more than a happy coincidence, suffice it to say that this study was obviously conceived long before Watergate became a household word, and that it couldn't have happened to a more deserving work.

If there was a current event that prompted this searching study of the origins and current problems of impeachment, it was probably Gerald Ford's legal justification, presented to the House of Representatives, for the proposed impeachment of Justice Douglas:

> What, then, is an impeachable offense?
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> The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. Again, the historical context and political climate are important; there are few fixed principles among the handful of precedents.[3]

Presumably, Congressman, now Vice-President, Ford did not fully appreciate that he could not have chosen words better calculated to provoke Raoul Berger into exploring the mustiest corners of the Harvard Law Library to prove him wrong. Yet, as Berger himself recognizes, Mr. Ford was not the first to give voice to such sentiments; indeed, he even had the support of such respectable authority as Thomas Cooley, who characterized impeachable offenses as " 'any such as in

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3. 116 CONG. REC. 11913 (1970).

the opinion of the House are deserving of punishment under that process' " (p.53 n.1). Furthermore, in one of its aspects, the result of Berger's research is to lend some support to the Cooley-Ford thesis. Expanding on what Mr. Ford meant by the handful of American precedents to include all of the available English precedents that might reasonably be considered to give content to "high crimes and misdemeanors," Berger establishes quite conclusively that the term must have been used in a sense quite different from that of the ordinary felonies or misdemeanors indictable under common law or statute. Indeed, the use of the term "misdemeanors" for the purpose of stating an impeachable offense first appeared before the concept of a misdemeanor as a minor crime had been developed. The difference between misdemeanor as an impeachable offense and misdemeanor as a petty crime is further accentuated by the occasional use in the English precedents of the term "high misdemeanors" without interposition of the word "crimes." Consequently, Berger reads the adjective "high" as applying to both crimes and misdemeanors, thus freeing the latter, and probably the former, from the straitjacket of indictable offenses.

This freedom is not, in Berger's view, to be equated with the conclusion that the key phrase either was intended or can now properly be interpreted as a blank check into which any content may be inserted, guided only by the political considerations of the moment. Rather it was a phrase deliberately chosen as a more confining substitute than the term first suggested, "maladministration." Presumably, as Berger suggests, the Framers must have been familiar with the use of the phrase in English impeachment practice and must have assumed that history would at least help to define its content. In pursuing that content, Berger suggests that the total number of discrete precedents are "reducible to intelligible categories." These include "misapplication of funds," "abuse of official power," "neglect of duty," "encroachment on or contempt of Parliament's prerogatives," "corruption," "betrayal of trust" and "giving pernicious advice to the Crown" (pp. 70-71). It might fairly be said that only the last of these categories might include instances of poor judgment or disagreements on policy within its ambit. But Berger draws back from such an implication by characterizing it as "extravagant" and explaining that it "derived in part from the postulated inviolability of the King, which compelled attribution of his misdeeds to his ministers," and that "it became a weapon in the struggle to make ministers accountable to the Parliament rather than the King, to punish them for espousing policies disliked by the Parliament" (p. 71). Another

example drawn entirely from history, of the difficulties that might be caused by emphasizing a "technical meaning" for high crimes and misdemeanors, is the treatment of the rendering of unconstitutional opinions by judges as impeachable conduct in at least one of the English precedents (p. 90). Here again Berger rejects the category as inapposite to the American framework, in which it is the appropriate business of judges to pass on questions of constitutionality.

Such a selective use of the lessons of history is entirely admirable from the standpoint of achieving a satisfactory content for the term "high crimes and misdemeanors" in the framework of our constitutional system. But it is at least partially inconsistent with the view, also espoused by Berger, that the Framers considered that the phrase had a "limited," "technical meaning" (p. 87).[4] This inconsistency suggests another question raised by Berger—namely whether "high crimes and misdemeanors" means the same thing for all types of offices—the Presidency, judgeships, high or low, and all other civil offices. Rather surprisingly for one who places such great emphasis on the "technical meaning" of the term "high crimes and misdemeanors," Berger now leans toward the view that it does not mean the same thing for all officers, although he previously espoused the view that the key words could be given only one meaning. Engagingly he tells us that "further study has led me to alter my view" (p. 91). Apparently this switch is induced more by practical than historical considerations—such as the "shock waves that can rock the very foundations of government" (p. 91); the "frustrations that may accumulate when succession to a President . . . falls to one whom the electorate did not really contemplate in the presidency" (p. 92) and, finally, the fact that "if the President brings disgrace upon his office by a lesser offense, for example, by openly associating with notorious corruptionists, the people can remove him at the polls" (p. 92). Berger concludes that

> it is difficult on removal of judges to attribute to the Founders an intention to curtail the common law scope of "high crimes and misdemeanors" (which they employed with consciousness of their "technical" meaning) merely because they had good

4. The particular reference to the "limited" and "technical" meaning of the phrase in the Constitutional Convention was not in discussion of impeachment, but rather in the course of rejecting "high misdemeanor" as one of the appropriate grounds for returning a fugitive from justice to the state from which he had fled: "In the Convention 'the words "high misdemeanor" were struck out, and "other crime" inserted, in order to comprehend all proper cases; it being doubtful whether "high misdemeanor" had not a technical meaning too limited . . . .' " R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 74 (1973), *quoting from* M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911).

> reason, not present in the case of judges, to stress that removal of the President required "great offenses." [P. 92.]

What then, we must ask, does Berger offer as the true or appropriate, if not "technical," meaning of "high crimes and misdemeanors"? To Ford's rather crass assumption that an "impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment of history," Berger opposes the view:

> If "high crimes and misdemeanors" had an ascertainable content at the time the Constitution was adopted, that content furnishes the boundaries of the power. It is no more open to Congress to stray beyond those boundaries than it is to include in the companion word "bribery" an offense such as "robbery," which had a quite different common law connotation. The design of the Framers to confer a limited power is confirmed by their rejection of removal by Address which knew no limits. [Pp. 87-88.]

Yet Berger reserves the right to reject some of the English precedents for the meaning of the phrase as inapposite to our own constitutional system, and even to vary the meaning, depending on the nature of the office involved. It is difficult for me to accept the conclusions that the English precedents serve as a kind of one-way street, that they establish the outermost limits of the phrase but do not necessarily permit us to reach all of those limits, and that the applicable limits vary with the offices. Rather I incline to the view that the English precedents shed only as much light either way, as a limiting or liberating force, as makes good sense under our system of government. Insofar as the phrase had a technical meaning for the Founders it must have meant the offenses that had been regarded as appropriate grounds for impeachment. But since they probably did not know as much about the English precedents as Berger and others have now taught us, it is at least questionable that the intention was either to embrace them all, or to limit the application of the phrase exactly to those categories that later scholarship might discover. Without doubt they chose the phrase conscious that it came to them freighted with historical significance; presumably they intended that the lessons of that history should not be ignored. To that extent, at least, Mr. Berger is surely right and Mr. Ford was wrong. Mr. Ford was also wrong if he was suggesting that the House in impeaching, or the Senate in convicting, could properly ignore the long-term significance of their actions, oblivious to the fact that they too would be making history and

creating constitutional precedent, and that this too might be a consideration far outweighing the political pressures for, or immediate advantages of, a change in the Presidency or any other office.

Incident to Berger's inquiry into the proper substantive meaning of the impeachment clause is the more procedural but equally important question of who is the final arbiter on the subject—the House and the Senate or the United States Supreme Court. Those familiar with Berger's general views concerning the institution of judicial review, as elaborated in his previous scholarship in the general field of administrative law and his other outstanding contribution to constitutional history, *Congress v. The Supreme Court*, will not be entirely surprised by his conclusion that the last word properly belongs to the Supreme Court. In arriving at this conclusion, Berger recognizes that he has some pretty formidable authorities to overcome, including Justice Story[5] and Professor Herbert Wechsler.[6] Nevertheless, he finds considerable comfort in the fact that Wechsler did not anticipate the holding in *Powell v. McCormack*[7] when he analogized the final authority of the Senate with respect to impeachment to the final authority of the House or Senate with respect to the seating or expulsion of members. In short, Berger concludes that the decision in *Powell* "calls for reconsideration of the scope of the Senate's 'sole' right to try impeachments" (p. 104).

Such reconsideration suggests, in the first place, an analogy between the three qualifications for membership in the House under article I, section 2—age, residence and citizenship (the only grounds upon which exclusion is permitted by the decision in *Powell*), and the three grounds to which impeachment is confined by article II, section 4—treason, bribery, or other high crimes and misdemeanors. If the Court may find a reviewable excess or abuse of power in a congressional exclusion that does not rest on one of the grounds of disqualification, why may it not also find a similar excess or abuse of power in an impeachment which is based on an obvious distortion of one of the three specified grounds? The weak link in this particular Berger argument is that the exclusion of Congressman Powell was admittedly not based on any of the three qualifications. Consequently, the question actually decided by the Court was whether exclusion was indeed limited to the three grounds of disqualification. A similar judicial review of an impeachment avowedly outside any of the three permissible categories

5. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 805 (5th ed. 1905).

6. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959).

7. 395 U.S. 486 (1969).

would be comparable and equally well-justified, as a review based on abuse of power. But the more likely and difficult case—with which Berger seems to be more realistically concerned—is an impeachment which purports to rest upon one of the three grounds, but in so doing gives such grounds a distorted and unjustifiable meaning.[8] It is true, as Berger argues, that the "political question" doctrine does not itself provide an insuperable obstacle, especially as interpreted in the recent cases of *Powell v. McCormack*[9] and *Baker v. Carr*.[10] The terms themselves—treason, bribery, high crimes and misdemeanors—are not obviously unfit for judicial determination; on the contrary, they are ostensibly the kind of language upon which judicial interpretation is most apt to thrive. As Berger demonstrates, neither is the conflict between the executive and the legislature inherently the type of controversy into which the Court should not enter.

Nevertheless, a strong case can be made for the proposition that the substance of the question—the exact meaning of the three grounds —has been entrusted by the Constitution to the joint judgment of the House and the Senate. This conclusion rests partly upon the constitutional evolution of the impeachment clause itself, embodying as it does a deliberate choice between the courts and the legislature as the instruments of impeachment, and partly upon what are conceived to be the realities of the process and its place in our constitutional system. The exact method of impeachment reflects a careful meld of the legislative and judicial processes, as is evidenced by the language giving the Senate "sole power to try impeachments" and the choice of the Chief Justice to preside in the trial of the President. To assume that a President, who, despite the great power and influence of his office, had so lost the confidence of the Republic that he could not survive the impeachment process, could be reinstated by a judgment of the Supreme Court, seems incompatible with political realities. To suggest that he might recover a money judgment in the Court of Claims for unjustified ouster would add a touch of mockery to the whole proceeding, irrespective of the likelihood of Congress appropriating funds to pay the judgment. Even though, as Berger suggests, impeachments are much more likely to occur with respect to other officials—particularly judges—the general theory of judicial review must be tested by its application to the hardest case.

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8. The example that Berger uses is an impeachment avowedly based upon a charge of "treason" but actually based on the ground that the President "attempted to subvert the Constitution." R. BERGER, *supra* note 4, at 106.

9. 395 U.S. 486 (1969).

10. 369 U.S. 186 (1962).

Another significant question to which Berger addresses himself, and to the solution of which he brings all the resources of his prodigious scholarship, is whether the impeachment process is constitutionally the exclusive method of removing article III judges. Berger's answer to the question is categorically in the negative. His reasons are a blend of analytical, historical and practical considerations. Analytically, he asserts that misbehavior, the opposite of "good behavior," is not coterminous with the grounds of impeachment, namely "treason, bribery and other high crimes and misdemeanors." Even if high crimes and misdemeanors are not restricted in the case of judges to "great offenses" suitable for presidential impeachment, as Berger himself believes, there are still types of conduct incompatible with "good behavior" as a judge that might not constitute grounds for impeachment. The most obvious examples would be irresponsible conduct resulting from senility, mental illness or frequent involvement in petty offenses incompatible with judicial dignity. Consequently, Berger concludes, it is difficult to believe that the Founders intended impeachment to be the sole method of removing federal judges. In Berger's view, this conclusion is historically supported by the English precedents antedating the Convention, by the colonial practice, by the constitutional debates and by the action of the first Congress. According to the English practice, *scire facias* was the accepted common law writ for forfeiture of any office held during good behavior (including judicial office), when the charge was misbehavior. This writ survived the development of impeachment and address (removal by the king upon the suggestion of Parliament) as alternative methods of removal. Further, *scire facias* was known to the Founders because it was reflected to some extent in the colonial and pre-constitutional state practices.

The debates in the constitutional convention are at best enigmatic on the exact point. The only explicit consideration of another method for removal of judges was the rejection of the suggestion that it be by "Address"—a method established in several states in the form of removal by the governor upon the recommendation of one or both houses of the legislature. The objections presented to this method of removal were that it would result in "weakening too much the independence of the Judges"; that it would be "fundamentally wrong" and "arbitrary" because it constituted "removal without a trial"; and that it would be inappropriate because "the Supreme Court is to judge between the United States and particular States" (p. 152-53). These objections, Berger argues, run only against removal by Congress or the Executive, not against a judicial removal analogous to *scire facias.*

Finally, Berger recognizes that there were some peripheral remarks contrary to this view in the first Congress during the debate on presidential removal powers. He finds these over-balanced by the action of the same Congress in providing "that upon a conviction in court for bribery a judge shall be 'forever disqualified to hold any offices' " (p. 150). Since this would be inconsistent with regarding impeachment as the exclusive method of creating disqualification from judicial office, Berger regards it as equally inconsistent with regarding impeachment as the exclusive method of removal from judicial office.

The historical arguments on the other side of the constitutional question (favoring impeachment as the sole remedy) have been developed primarily by Martha Andes Ziskind[11] and Philip Kurland.[12] Ziskind thinks that the early English precedents, especially those dealing with *scire facias* as a method of removing judges, are of little, if any, significance in determining the intention or understanding of the Framers. She believes that *scire facias*, for this purpose, was replaced by removal upon Address of both Houses of Parliament as provided for in the Act of Settlement in 1701.[13] She also notes that "Blackstone, the principal source of English law for eighteenth century Americans, did not mention judicial removal by *scire facias*," and that "no colonial or state constitution provided for such a use for the *scire facias*, nor was a proposal made to include it during the Constitutional Convention."[14] Berger suggests in response that failure of the state constitutions to mention *scire facias* is immaterial because "it is not the function of a Constitution to detail relevant writs" (p. 145). He attaches more importance to the fact that both the Delaware and Maryland constitutions provided for court removal upon conviction of misbehavior, thus precluding the inference that there was total ignorance of judicial forfeiture.

To my mind, the historical background is far from conclusive either way. Nevertheless, the care with which the state constitutions provided for removal of judges, either by impeachment, address, judicial forfeiture or some combination of these, plus the absence of any reference to the common law method of removal in any of the conven-

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11. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, in 1969 SUP. CT. REV. 135.

12. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969). *But see* Shartel, *Federal Judges—Appointment, Supervision and Removal—Some Possibilities under the Constitution*, 28 MICH. L. REV. 870 (1930), taking the same position as Berger.

13. 12 & 13 Will. 3, c. 2, § 3 (1700).

14. Ziskind, *supra* note 11, at 138.

tion debates, or contemporaneous literature, suggests that the Framers probably were not relying upon any common law solution for the problem, even if they were aware of it. Such a reading of the constitutional history does not preclude an implied power in Congress, arising from the good behavior clause and the necessary and proper clause, to provide for removal of judges by means other than impeachment. As Berger suggests, the means would have to be consistent with the independence of the judiciary. Even so, I share Kurland's concern that the particular remedy chosen might be worse than the disease.[15] The exact form that Congress might provide cannot be foretold with any confidence; numerous possibilities may be imagined. Berger sug-

15. Kurland, *supra* note 12, at 666. Berger himself suggests that if the impeachment clause were to be deemed exclusive, "it is reasonable to assume that the exigencies of government which led proponents of removal to stress that removal of incapacitated officers was imperative would have prevailed on them to overlook the verbal difficulties of stretching 'high crimes and misdemeanors' to include insanity and 'incapacity.'" R. BERGER, *supra* note 4, at 186. The stretch is not so great if the emphasis is placed upon the conduct involved, *i.e.*, the attempt to perform judicial duties when one is obviously incapable of performing them properly. Furthermore, if one adopts the view of Mr. Justice Harlan, in Chandler v. Judicial Council, 398 U.S. 74, 89 (1970) (concurring in denial of writ), that the Judicial Council may take into account a judge's ability to dispose of his docket in the assignment of cases, *id.* at 121, then the necessity for the more drastic step of total disqualification may frequently be avoided. Finally, the possibility of the Senate's delegating to some of its members the time-consuming job of hearing the evidence in impeachment proceedings should not be summarily rejected as unconstitutional, even though Berger seems inclined in that direction. R. BERGER, *supra* note 4, at 172-73. The Rules of the Senate, 92d Congress, provide:

> XI. That in the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.
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> Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

S. Doc. No. 92-1, 92d Cong., 1st Sess. 137-38 (1971). This is considerably different from the proposal advanced by Preble Stolz, and vigorously attacked by Berger, for the use of masters who would make proposed findings of fact and conclusions of law. *See* Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?* 57 CALIF. L. REV. 659 (1969).

gests a special court, comparable to the Emergency Court of Appeals, consisting of district and circuit judges, with perhaps one Supreme Court Justice, that would "hear and determine charges of misbehavior filed by the investigatory-accusatory branch of the Judiciary Department; and upon a finding of 'misbehavior' a judgment would issue removing the offending judge, a forfeiture of the office" (p. 175). Irrespective of the merits of the proposal, or the intentions of the Framers concerning the removal of judges, this proposal seems a significant enough departure from the actual practice of our constitutional system to warrant a constitutional amendment. Having waited this long to make any change in this particular aspect of government, can we not wait a little longer for the amendment process to take effect? With the possible exception of the equal rights amendment, that process has not proven inadequate in recent years, where the need has been considered great enough. The best illustration is the twenty-fifth amendment dealing with the similar problem of the incapacity of the President. Of course, the case of any one federal judge is not comparable to that of the presidency, but the general question of how federal judges appointed pursuant to article III are to be removed is surely one of constitutional dimension. Furthermore, its solution might well be linked with a mandatory age for retirement of all federal judges, a change that might considerably simplify the problems of removal.

I trust that this and other points of disagreement, or qualified agreement, with some of Berger's views will be taken as tributes to, rather than as disparagements of, the value of his contributions. The points of disagreement are based more on Berger's scholarship than on my own, and have been principally stimulated by his meticulous separation of primary findings from ultimate conclusions. This reviewer has deliberately concentrated on the areas of disagreement, rather than upon the areas of complete accord, including, for example, the splendid vignettes of the Chase and Johnson impeachment proceedings. Berger presents each of these as an object lesson in how impeachments should not be handled—the Chase impeachment because the Justice should not have been acquitted; the Johnson case because the proceedings should not have been conducted in the first place.[16] I can only commend these chapters to the reader's attention, along with the rest of the book, as the finest background available, not only for the problems of the immediate present, but also for possible encounters with similar problems in the years to come.

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16. For a sympathetic view of the Johnson impeachment proceeding, see M. BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973).